Supreme Court, U.S.
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No. 95-1916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CLARENCE MOORE and PENNLYCO, LTD.,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL A. TUFANO
(Counsel of Record)
General Counsel
Commonwealth of Pennsylvania
Office of General Counsel
225 Main Capitol
Harrisburg, PA 17120
(717) 787-2551

VIRGINIA J. DAVISON
WILLIAM W. SHAKELY
Office of Chief Counsel
Department of Conservation and
Natural Resources
P.O. Box 8767
Harrisburg, PA 17105-8767
(717) 772-4171
Counsel for the Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, Respondent

QUESTIONS PRESENTED

1. Does a state statute which provides a statutory remedy only for takings resulting from the government's use of eminent domain powers, where other remedies exist for other types of taking, violate the Fifth and Fourteenth Amendments to the United States Constitution?

2. Has a court properly dismissed a takings claim where the litigant has not proved either that his property was affected by any sovereign power or that it has been physically occupied by the government?

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Respondent Commonwealth of Pennsylvania, Department of Conservation and Natural Resources ("Department"),[1] hereby opposes the Petition for Writ of Certiorari filed by Clarence Moore and Pennlyco, Ltd. ("Moore").

RESPONDENT'S STATEMENT OF THE CASE

Factual and Procedural Background

The Commonwealth of Pennsylvania (the "Commonwealth") owns and manages the Tiadaghton State Forest in north central Pennsylvania. The Commonwealth, by its Department of Forests and Waters, predecessor agency to the Department of Environmental Resources and the Department of Conservation and Natural Resources, purchased 25,261 acres of property from the Central Pennsylvania Lumber Company in 1933. This land is now part of the state forest.

Moore owns oil and gas which underlie some of the acres purchased from the lumber company. In 1979, he visited the offices of the Department to inquire about what was necessary to "develop" or mine the oil and gas on the property. At his meeting with the Department's minerals manager,

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[1] At the time of the trial of the matter at issue, the duties of the present Department of Conservation and Natural Resources were performed by the Commonwealth's Department of Environmental Resources ("DER"). In 1995, pursuant to the Pennsylvania Conservation and Natural Resources Act, Act of June 28, 1995, P.L. 89, No. 18, 71 P.S. §1340.101 *et seq.*, the Pennsylvania General Assembly divided DER into two agencies, the Department of Environmental Protection and the Department of Conservation and Natural Resources. The Department of Conservation and Natural Resources now manages the Commonwealth's state forests.

Moore and the manager discussed the meaning of the reservation clause in the 1933 deed. The Department's interpretation of the clause was that the lumber company would own the minerals and have access to them for fifty years from the time of the grant of the surface to the Commonwealth, that is, until March 1983. In March 1983, the Department believed, all the reserved property would revert to the Commonwealth.

While he did not disagree at the time, Moore later formulated a different interpretation of the reservation clause. Some time after his initial meeting with the Department, Moore decided that the reservation was intended to give the lumber company permanent ownership of the mineral estate, including access for development via the surface.

The Department, confident of its interpretation of the 1933 deed, acted on requests made by gas companies that the gas and development rights be offered at a bid sale. The sale was held in December 1983. Pennzoil, the successful bidder, once apprised of Moore's interpretation of the reservation clause and threatened by Moore with a lawsuit, had an independent title search performed. The search resulted in a formal opinion by the title company's legal counsel to the effect that 18,780 of the acres of oil and gas clearly was the property of the Commonwealth but the ownership of 6,841 acres was not clear. After reviewing the title company's work, the Department removed the 6,841 acres from its lease offering. In November 1984, Pennzoil went ahead with its plan to lease the 18,780 acres about which its consultant was confident and entered into a ten-year oil and gas development lease with the Department, paying a rent for the surface and promising a royalty on all oil and gas removed from the ground.

Moore presented, by way of petition, his theory of ownership to the Commonwealth's Board of Property, the administrative tribunal which hears challenges to Commonwealth claims to real property. The Board held that the Department's interpretation of the 1933 deed was correct, that is, as of March 1983, the Department owned the 18,780 of oil and gas acres in fee. Moore appealed that holding to the state's Commonwealth Court. In its opinion titled *Moore v. Department of Environmental Resources*, 129 Pa. Commw. Ct. 628, 566 A.2d 905 (1989), the Commonwealth Court set forth its interpretation of the deed: Moore owned the oil and gas, but his right to use the surface for access for development had expired in March 1983.

Pennzoil never developed the oil and gas. The company's lease with the Department required that development activities be commenced in order for the lease to remain in force. As a result, the lease lapsed before the Commonwealth Court had issued its opinion, but after Pennzoil had paid the Department about $297,000 in rent.

Moore brought suit against the Department in two fora, the Lycoming County Court of Common Pleas and the Board of Claims, the tribunal which hears contract claims brought against the Commonwealth. In the Board of Claims action, which is still pending, Moore seeks to recoup the money paid to the Department by Pennzoil as well as an amount which Moore claims is the worth of the mineral estate.

Moore brought his takings claims in the trial court under Section 502(e) of Pennsylvania's Eminent Domain Code, Act of June 22, 1964, Sp. Sess., P.L. 84, 26 P.S. §1-101 *et seq.* (the Eminent Domain Code). Sometimes referred to as the "*de facto* takings" provision, Section 502(e) authorizes a

condemnee to seek damages for the uncompensated use of the eminent domain power.

Over the Department's objection that Moore had failed to state a cause of action under the Eminent Domain Code, the trial court found that Moore's oil and gas had been taken from 1979 to 1989, beginning with the Department's assertion that it would own the mineral estate in March 1983 and ending with the termination of Pennzoil's lease.

The Department appealed the trial court's determination to Commonwealth Court, which agreed with the Department that Moore had no cause of action for a *de facto* eminent domain taking. Expressly declining to decide whether Moore had a case under some other theory, the Commonwealth Court dismissed the claim brought under the Eminent Domain Code.

Moore requested that the Commonwealth Court reconsider its decision, which the court, without comment, refused to do. Moore also unsuccessfully petitioned the Pennsylvania Supreme Court to hear an appeal from the decision of the Commonwealth Court. The instant petition followed.

SUMMARY OF THE ARGUMENT

The Commonwealth Court was correct in finding that Moore's takings complaint, brought under the "*de facto* takings" provision of the Pennsylvania Eminent Domain Code, should be dismissed. Moore simply failed to state a cause of action under the statute. In order to find a taking under the Code, a court must find that the government used its eminent domain authority to affect the property in question. In order to use the Code's remedies for takings effected by the police

power, the court must be presented with an established taking found by a board or court acting under the appropriate statutes.

Moore presented no evidence to the Lycoming County Court of Common Pleas that the Department used its eminent domain authority or any regulatory power in regard to his oil and gas. The Department never occupied or in any way deprived the defendants of their property. All the Department's actions in regard to the oil and gas arose from a contract which gave Moore fifty years of full access to the oil and gas until March 1983, when he lost the right to use the Department's surface land.

The Department leased oil and gas development rights to Pennzoil, whose consultant read and interpreted the various deeds which concerned the ownership of the oil and gas throughout the years and reached the conclusion that the Department owned the oil and gas at issue. The Department's actions, either before or after March 1983, did not prevent Moore from offering the rights to the oil and gas to a customer of his own, had he been able to find one. Neither the Department nor any agent physically intruded upon or removed the oil and gas. Precedent which addresses physical occupation as taking does not apply.

If there is a claim of a taking as a result of some other mechanism, that claim must be examined by the relevant procedure and in the appropriate forum. Those procedures and their proper fora have been established by the appellate courts and are available to claimants.

The Department did not take Moore's oil and gas. Rather, the Department acted as an owner who after acquiring its property by purchase, put its property to proper use.

ARGUMENT

A. Takings Law in Pennsylvania

Government entities in Pennsylvania can take private property by two mechanisms: by the declared or undeclared use of the eminent domain authority or by a regulatory action which eliminates all the owner's beneficial use of the property, *Machipongo Land and Coal Company, Inc. v. Department of Environmental Resources*, ___ Pa. ___, 676 A.2d 199 (1996). These are the same mechanisms which this Court has recognized. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

B. The Petitioner's Claims

1. Taking by the Use of the Eminent Domain Power.

Moore contends that he has suffered what has come to be known in Pennsylvania as a "*de facto*" taking. He offers a two-fold explanation of his contention. First, he claims that his property was taken as a result of the Department's use of certain unnamed "unassailable powers," wielded under "authority of law" (Petition, p. 7). Second, he points out that physical occupation by government is always a taking and, in so doing presents the unstated but necessary implication that the Department physically occupied the oil and gas (Petition, pp. 8-10).

The *de facto* takings concept comprehends undeclared takings effected by the actual but undeclared use of the

eminent domain power.[2] The *de facto* takings provision of the Eminent Domain Code states:

> Section 502(e). If there has been a compensable injury suffered andno declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers substantially in the form for in subsection (a) of this section, setting forth such injury.[3]

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[2]The Commonwealth Court has said in *dicta* that the *de facto* takings remedies may be available to the property owner whose property has been established by the appropriate court to have been taken by the government's use of its police powers. Claims of taking by overly burdensome environmental regulations are heard and decided by the Environmental Hearing Board, zoning challenges by the Common Pleas Court pursuant to the Municipal Planning Code, and legislative challenges by the Commonwealth Court. Once a taking is found, compensation due may be determined and awarded by the "*de facto* takings" remedies of the Code. *Machipongo Land and Coal Company, Inc. v. Department of Environmental Resources, supra,* and *Beltrami Enterprises, Inc. v. Department of Environmental Resources,*159 Pa. Commw. Ct. 72, 632 A.2d 989 (1993).

[3]The subsection referred to sets forth the method by which the condemnee requests viewers, whose task it is to determine the value of property which has previously been determined by a court of competent jurisdiction to have been taken. Moore's original action was a petition for a board of viewers to which the Department filed objections. The objections were based on the Department's view that Moore's property had not been determined to have been taken and had not, as a matter of fact and law, been taken by the Department's use of its eminent domain authority. The relief requested was dismissal for failure to state a cause of action under Section 502(e) of the Eminent Domain Code. The refusal to dismiss was the sole question before the Pennsylvania appellate courts, which agreed with the Department.

A compensable injury comprises specific factual elements, which have been clearly set forth by the state courts. The Pennsylvania Commonwealth Court opinion being challenged here sets forth and explains those elements, all of which are necessary for a case to fall within §502(e). Simply stated, the governmental entity must have substantially deprived the property owner of the use and enjoyment of his property as a result of the use of the eminent domain power.

Taking by the undeclared use of eminent domain may manifest itself in physical occupation or in the inability of the owner to gain the commercial benefits he intended. The Commonwealth court examined only one issue in *Moore v. Department of Environmental Resources*: whether the Department had exercised its power of eminent domain to affect the property. Finding that there had been no use of that authority, Commonwealth Court agreed with the Department that Moore had failed to state a cause of action and dismissed the case.

The Commonwealth Court did not insist that the use of the eminent domain power be formally declared, as Moore has implied. The court did recognize, however, that, except for the established regulatory deprivations discussed above, an alleged deprivation remediable under the Eminent Domain Code must result from some exercise of eminent domain authority, whether formally acknowledged or inferred from the factual circumstances.

The Commonwealth Court was correct in finding the necessary evidence of use of the eminent domain power missing and in determining that Moore had not, therefore, suffered an injury compensable under the Eminent Domain Code.

2. Physical Occupation

In his Petition for Certiorari, Moore does not directly confront the Commonwealth Court's holding concerning the appropriate use of eminent domain procedures, but instead appears to argue that the Department physically occupied the oil and gas estate.

It is true, as the petition states, that permanent physical occupation of property has traditionally been an index of taking. What is quite obviously not true, however, is that the Department physically occupied Moore's oil and gas estate. The Department did not invade the oil and gas estate or remove any oil and gas from the premises; nor did it take any action to prevent oil or gas from leaving the 18,780 acre underground area or from being removed by anyone else, including by the common method of sinking a well on neighboring property.

Instead, after informing the relevant public, namely potential lessees, that it believed but could not guarantee that it was the owner of the oil and gas, the Department leased the development rights to a sophisticated company which independently determined that it was leasing from the proper party. Further, the Department did not lease the property to Pennzoil until the end of 1984. The Department's connection to the property was even more attenuated from 1979 to 1983, the only years Moore had the right to use the surface for development activities.

Neither the trial court nor the Commonwealth Court found that there was any physical intrusion. Although the Commonwealth Court did include in its opinion the observation that physical occupation is taking, they proceeded to find that no taking had occurred. Clearly, the appellate

court eliminated physical occupation of Moore's property from its analysis (Petition, p. 5a).

Pennsylvania courts have recognized that true physical occupation is a taking and that takings are compensable. However, there is no constitutional insult as a result of this dismissal because the facts do not indicate any physical intrusion or occupation.

3. The Relevance of the Department's Mistaken Interpretation of the Deed.

Moore also implies that the Commonwealth Court has held that a taking of his property does not require compensation because the taking occurred as the result of a mistake. This drastically misstates the holding below, which is that there was no *de facto* taking because there was no use of the eminent domain power and no other manifestation of taking. This argument is another in the series of arguments which mischaracterize the Commonwealth Court's opinion. This Court should not be misled.

C. Moore's Claim is Not One Which Should Invoke Review by this Court.

Moore originally brought his claim under the Pennsylvania Eminent Domain Code. He has not suggested that the Code itself violates the United States Constitution. Rather, he argues that the Commonwealth Court's opinion holds that a taking requiring compensation cannot result without the formal, declared use of eminent domain authority. The opinion below states nothing of the kind. The court merely reiterated that eminent domain, in one of its characterizations, must be an element of any situation in which

the procedures of the Pennsylvania Eminent Domain Code are invoked. The Commonwealth Court specifically pointed out that it was holding only that Moore had not presented a claim under the Eminent Domain Code. The Pennsylvania courts and legislature have established procedures for property owners who believe that their properties have been taken by other mechanisms or have been affected in ways that do not involve takings. *Machipongo, supra; Gaebel v. Thornbury Township,* 8 Pa. Commw. Ct. 399, 303 A.2d 57 (1973); *Department of Transportation v. Castillo,* 14 Pa. Commw. Ct. 22, 321 A.2d 394 (1974).

Finally, and most telling, the Petition presents none of the traditionally recognized grounds on which this Court has based a grant of certiorari. See Sup. Ct. R. 10. Although Moore gives the impression that this Pennsylvania decision conflicts with United States Supreme Court decisions, it absolutely does not. There has never been a decision by this Court that government action which does not involve the use of eminent domain amounts to a taking compensable under the procedures of any eminent domain statute. More broadly, there has never been a decision by this Court that any action of a government agency regarding property will always amount to a taking.

The decision below is an interpretation of Pennsylvania eminent domain law that is unlikely to be repeated in any jurisdiction other than Pennsylvania. Whatever wrong Moore may believe he has suffered, he has not been unconstitutionally deprived of a compensatory remedy. He need only go to the correct forum, under the correct theory, to seek the proper relief. He is not without recourse, but he is without a constitutional injury.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PAUL A. TUFANO
(Counsel of Record)
General Counsel
Commonwealth of Pennsylvania
Office of General Counsel
225 Main Capitol
Harrisburg, PA 17120
(717) 787-2551

VIRGINIA J. DAVISON
Assistant Counsel
WILLIAM W. SHAKELY
Chief Counsel
Office of Chief Counsel
Department of Conservation
and Natural Resources
P.O. Box 8767
Harrisburg, PA 17105-8767
(717) 772-4171